

Summaries of Selected Opinions

No. 17-1236. Lee v. Tucker. 9/24/2018. D.Co. Judge Lucero. *Excessive Force—Qualified Immunity—Fourth Amendment—Interlocutory Jurisdiction—Domestic Violence.*

Plaintiff sued four sheriff's deputies alleging they violated his Fourth Amendment rights when they used excessive force to detain him during their response to a domestic violence call. The deputies moved for summary judgment based on qualified immunity. The district court denied the motion.

On appeal, defendants argued that the district court erred in both finding a violation of a constitutional right and in concluding the right was clearly established at the time they acted. The Tenth Circuit's review was limited to (1) whether the facts that the district court ruled a reasonable jury could find would suffice to show a legal violation, and (2) whether the law was clearly established at the time of the alleged violation. As to the first prong, defendants argued that plaintiff posed an immediate threat and he actively resisted arrest or attempted to flee. The district court concluded that the jury would have to decide these facts, so the Tenth Circuit lacked jurisdiction to consider these factual issues. Regarding the second prong, the law was clearly established that the use of a Taser without warning on a non-resisting misdemeanor violates the Fourth Amendment. Under the facts articulated by the district court, defendants violated plaintiff's rights by repeatedly applying a Taser without warning when plaintiff was not resisting the officers and had not been advised that he was being detained.

The appeal was dismissed as to factual challenges. The order was otherwise affirmed.

No. 17-8055. Smith v. Cheyenne Retirement Investors L.P. 9/25/2018. D.Wyo. Judge Ebel. *Employment—Retaliation—Exhaustion of*

Administrative Remedies—Jurisdiction—Affirmative Defense—Dismissal without Prejudice.

In 2012, plaintiff filed a complaint with the Equal Employment Opportunity Commission (EEOC) against Pointe Frontier Retirement Community (the employer) alleging she was denied promotions on the basis of her age and race and in retaliation for previous discrimination complaints. The EEOC dismissed the charge for lack of evidence and issued plaintiff a right-to-sue letter, but plaintiff did not file suit. Shortly thereafter, the employer hired a new supervisor who supervised plaintiff. Plaintiff called the employee hotline and complained that the new supervisor had harassed her. Two weeks later, plaintiff was fired. In 2014, she filed another EEOC charge based on race, age, and retaliation, but she did not reference the 2012 charge. The EEOC again found insufficient information and issued plaintiff a notice of her right to sue.

Plaintiff then filed suit, alleging as the only ground for relief that her termination was in retaliation for filing the 2012 discrimination charge. In responding to the 2014 charge, the employer referenced the 2012 EEOC action. The district court found that the claim pled was not the same as that pled in claimant's 2014 EEOC charge, and therefore she failed to exhaust her administrative remedies. Thus, the district court granted the employer's motion to dismiss the claim for lack of subject matter jurisdiction. The district court also found that there was no genuine issue of material fact and, in the alternative, granted the employer's summary judgment motion.

On appeal, as a threshold matter, the Tenth Circuit clarified that failure to exhaust administrative remedies is not a jurisdictional requirement, but rather is an affirmative defense.

The employer argued that plaintiff's claim in this lawsuit was not presented to the administrative agency as part of her 2014 EEOC charge, while plaintiff argued that the employer's response, which mentioned the 2012 charge, should be considered. A plaintiff's federal court claim is generally limited by the scope of the administrative agency's investigation, which is determined by the allegations contained in the charge itself, rather than in the charge and any responsive documents. Here, the claim plaintiff alleged in the underlying lawsuit—unlawful retaliation for filing the 2012 EEOC charge—was not presented to the EEOC as part of her 2014 charge. Because the claim was not within the scope of the 2014 charge, the district court properly dismissed it.

The district court's decision to dismiss the cases was affirmed, but the case was remanded to clarify that the dismissal was without prejudice.

No. 17-2077. United States v. Lymon. 10/2/2018. D.N.M. Judge Ebel. *Sentencing Guidelines—Consecutive versus Concurrent Sentence.*

Defendant pleaded guilty to three offenses charged in a single indictment: two counts of selling heroin to an undercover officer on two separate occasions, and one count of being a previously convicted felon in possession of a gun. Using USSG Ch. 3, Pt. D, the district court grouped the counts to establish a single combined offense level for the three convictions. It derived an advisory Sentencing Guideline range of 77 to 96 months' incarceration and then varied upwardly from this range to a total sentence of 216 months' incarceration. It reached this sentence by mostly running the sentences on each count consecutively,

instead of concurrently, as called for in the Sentencing Guidelines.

On appeal, defendant raised several procedural challenges to his sentence. He first argued that USSG § 5G1.2 required the district court to run his sentences concurrently. Although § 5G1.2 states that sentences on all counts “shall” run concurrently, the Guidelines are advisory, not mandatory, and a sentencing court has discretion to deviate from this recommendation after considering the statutory sentencing factors in 18 USC §§ 3584 and 3553(a). Here, the district court considered the advisory recommendation and imposed consecutive sentences only after a thorough discussion of the sentencing factors and a detailed explanation of its sentencing decision. The district court did not err.

The sentences were affirmed.

No. 18-5000. United States v. Porter. 10/10/2018. N.D.Okla. Judge O’Brien. *Revocation of Supervised Release—Waiver of Right to Appeal—Aggregation Requirement.*

Defendant pleaded guilty to making a false statement to the United States after she used a tax software program to file 123 false tax returns using taxpayer information that she stole or purchased from the taxpayer or a third party. She was sentenced to 48 months’ incarceration, followed by a three-year term of supervised release. She completed the term of incarceration, but during her term of supervised release, she stole merchandise from various stores. The judge revoked her supervised release and sentenced her to 24 months’ incarceration, to be followed by a new 12-month term of supervised release. She again completed her term of incarceration, but again violated her supervised release by stealing sunglasses from a store. The judge again revoked her supervised release and sentenced her to 24 months’ incarceration, with no additional term of supervised release.

On appeal, defendant challenged her latest 24-month sentence. As a threshold matter, the Tenth Circuit held that she had not waived her right to appeal. Although her original plea agreement contained a waiver of her appellate rights, she would reasonably have understood

that appeal to apply only to her right to appeal from, or seek collateral review of, her original sentence. Had the parties wished the waiver to include her right to appeal from a sentence imposed upon revocation of supervised release, they could have included a provision to that effect in the plea agreement.

On the merits, defendant argued that the sentence violated 18 USC § 3583(h)’s aggregation requirement. The aggregation requirement requires the court to give a defendant credit for all terms of imprisonment imposed upon a revocation of supervised release. But it applies only to the length of the term of supervised release to be imposed following a revocation. Here, no new term of supervised release was imposed. The sentence did not violate the aggregation requirement.

The sentence was affirmed.

No. 16-1412. Exby-Stolley v. Board of County Commissioners. 10/11/2018. D.Colo. Judge Hartz. *Employment Discrimination—Americans with Disabilities Act—Reasonable Accommodation—Adverse Employment Action—Constructive Discharge Instruction—Undue Hardship.*

Plaintiff sued her former employer, the Board of County Commissioners of Weld County (the employer), alleging it violated the Americans with Disabilities Act (ADA). She claimed that the employer failed to provide reasonable accommodations after she injured her arm and was unable to perform her past duties as a health inspector. A jury trial was held at which plaintiff testified that the employer refused to accommodate her disability and instead forced her to resign. In contrast, the employer presented evidence that supervisory personnel were in the midst of finding reasonable accommodations when plaintiff quit. The jury returned a verdict in the employer’s favor.

On appeal, plaintiff argued that the district court improperly instructed the jury that she had to prove she had suffered an adverse employment action. The Tenth Circuit rejected this argument because an adverse employment action is an element of all ADA discrimination claims, including failure-to-accommodate claims. The Tenth Circuit also rejected plain-

tiff’s suggestion that any failure to reasonably accommodate constitutes such action, stating that an employer’s failure to immediately accommodate a disabled employee’s request for accommodation is not in itself an adverse employment action.

Plaintiff also argued that the district court erred in rejecting her proffered jury instruction on constructive discharge and did not permit her to argue constructive discharge at trial. Before submitting the instruction, plaintiff had never asserted that she had a constructive-discharge claim, but alleged that she had been discharged or fired. Therefore, the district court did not abuse its discretion in refusing the proffered instruction.

Lastly, plaintiff argued that the district court should have instructed the jury on undue hardship. Any error in that regard was harmless because once the jury found there was no adverse employment action, undue hardship was irrelevant.

The judgment was affirmed. **CL**

These summaries of selected Tenth Circuit opinions are written by licensed attorneys Katherine Campbell and Frank Gibbard. They are provided as a service by the CBA and are not the official language of the court. The CBA cannot guarantee the accuracy or completeness of the summaries. The full opinions are available on the CBA website and on the Tenth Circuit Court of Appeals website.